

Conley Ward ISB #1683
GIVENS PURSLEY LLP
277 North 6th Street, Suite 200
P.O. Box 2720
Boise, ID 83701
(208) 388-1200
(208) 388-1300 (fax)

Attorneys for Nu-West Industries, Inc.
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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF
PACIFICORP DBA UTAH POWER & LIGHT
COMPANY FOR APPROVAL OF CHANGES
TO ITS ELECTRIC SERVICE SCHEDULES

CASE NO.: PAC-E-02-1
COMMENTS OF NU-WEST
INDUSTRIES, INC.

Nu-West Industries, Inc. (“Nu-West”), by and through its attorneys Givens Pursley LLP, submits the following Comments in response to the Idaho Public Utilities Commission’s (“Commission”) Notice of Stipulation and Proposed Settlement in the above entitled case.

Nu-West operates a phosphate fertilizer production facility near Soda Springs, Idaho. Nu-West is PacifiCorp’s second largest Idaho customer with a peak demand of approximately 22,000 kilowatts. Although the Nu-West facility has been through a number of ownership changes over the years, it has been a PacifiCorp customer for at least three decades.

On June 9, 1998, Nu-West and PacifiCorp entered into a Master Electric Service Agreement (“1998 Agreement”), in which PacifiCorp agreed to supply Nu-West’s electric power and energy up to a peak contract demand of 22,000 kilowatts for approximately three and one half years, through December 31, 2001. The price for this power was fixed for the term of the 1998 Agreement at \$.033/kwh if Nu-West exceeded the stated minimum annual consumption figures, and \$.034339/kwh if Nu-West’s consumption fell below the minimum. The 1998 Agreement contained no provisions permitting the Commission to alter Nu-West’s rates during the life of the contract. A copy of the 1998 Agreement is attached as Exhibit A.

Through an oversight, PacifiCorp neglected to immediately file the 1998 Agreement

for Commission approval. On March 17, 2000, PacifiCorp belatedly filed for approval of the 1998 Agreement, and approval was granted with a retroactive effective date of July 1, 1998. Order No. 28399, Case No. PAC-E-00-3 (June 13, 2000) (Copy attached as Exhibit B).

Shortly before the expiration of the 1998 Agreement, PacifiCorp and Nu-West entered into a new Electric Service Agreement dated December 10, 2001 (“2001 Agreement”). A copy of the 2001 Agreement is attached as Exhibit C. Unlike the prior 1998 Agreement, the 2001 Agreement specifically addresses the Commission’s ratemaking authority. Section 8.3 of the 2001 Agreement states:

The parties agree that the Commission has the authority to modify the rates for service under this Agreement under the same standard that applies to tariff customers generally. Accordingly, surcharges or credits that apply to service to tariff customers generally will also apply to service under this Agreement.

However, the Agreement also contains a provision in Section 4.2, which provides that Nu-West’s rates shall be adjusted annually according to a prescribed formula that constitutes “the sole and exclusive means of adjustment.”

In its Comments on the 2001 Agreement, Staff questioned the apparent conflict between Sections 4.2 and 8.3, and requested clarification from PacifiCorp. According to the Commission’s order,

PacifiCorp replied that Section 8.3 of the submitted Agreement controls. If the Commission were to find that some particular rate is the just and reasonable rate to be charged Nu-West, that determination would apply notwithstanding the rate calculated under the other terms of the Agreement. If however, there were not a specific Commission determination of the rates for Nu-West (for instance, if a general rate increase were spread by stipulation), the Company contends that the rates for Nu-West would be established pursuant to Section 4.2.

Order No. 28984 at 4, Case PAC-E-01-17 (March 27, 2002) (emphasis added). A copy of Order No.28984 is attached as Exhibit D. With this clarification, the Commission approved the contract, finding “the remaining contract terms, as clarified, to be acceptable.” *Id.*

Shortly after PacifiCorp filed the 2001 Agreement with the Commission, PacifiCorp filed its Application in the present case on January 7, 2002, seeking authority to recover \$38 million in excess net power costs incurred from November 1, 2000 through October 31, 2001. The Commission initially authorized the deferral of these costs for possible later recovery in an order dated November 1, 2000. As filed, the Application did not seek any recovery of any of the extraordinary power costs from Nu-West.

It was not until the Commission issued its Notice of Stipulation and Settlement in this case on April 22, 2002, that Nu-West had any notice that its contract rates were at issue in this proceeding. Attachment B to the Stipulation and Settlement now proposes to impose a \$936,000 power cost surcharge on Nu-West. After giving effect to a rate mitigation adjustment to Nu-West of \$777,000, the net effect is a \$159,000 per year rate increase for Nu-West in each of the next two years.

This unannounced attempt to shift nearly \$1,000,000 a year in power cost surcharges to Nu-West is unreasonable and unlawful in several respects. In the first place, the attempt to recover from Nu-West for excess power costs incurred during 2000 and 2001 is clearly at odds with the terms of the 1998 Agreement that was in effect during that period. The 1998 Agreement provided for fixed rates during the term of the Agreement, and neither PacifiCorp nor the Commission was authorized to alter those rates except upon an extraordinary showing that the rate “is so low as to adversely affect the public service—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory.” *Agricultural Products Corporation v. Utah Power & Light Co.*, 98 Idaho 23, 29, 557 P.2d 617 (1976). No such showing has been made, or even attempted, in this case.

The fact that PacifiCorp was allowed to defer recovery of its excess power supply costs until after the expiration of the 1998 Agreement does not change the applicability of the *Agricultural Products* rule. The Commission cannot do indirectly what it is prohibited from doing directly. If an authorized deferral of costs could be used to skirt the *Agricultural Products*

rule, the rule would be a dead letter because the Commission could circumvent it at will. There is no basis in law or equity for an attempt to do so in this case. The simple fact is that PacifiCorp contractually agreed to specific rates for the period from 1998 through 2001 irrespective of its cost of service. If costs had decreased during the contract rate period, Nu-West clearly would not now be allowed to recover the difference as an alleged overpayment.

The Stipulation and Settlement's treatment of Nu-West is likewise a breach of Nu-West's existing contract and a violation of the Commission order approving the 2001 Agreement. As Order No. 28984 makes clear, the 2001 Agreement contemplated that Nu-West would not be subject to general rate proceedings as a matter of course. The parties intended the contract rates to apply unless and until the Commission specifically determines that the Nu-West contract rates are unjust and unreasonable. PacifiCorp's initial application in the present case, filed less than a month after the 2001 Agreement was signed and while the 2001 Agreement was awaiting approval, is compelling evidence that PacifiCorp understood that Nu-West was contractually excluded from rate adjustments in cases such as this. Moreover, the Commission's order approving the 2001 Agreement explicitly approved the clarification of the parties intent and acknowledged that Nu-West would not be subject to "a general rate increase. . . spread by stipulation."

All of PacifiCorp's and the Commission Staff's actions during the Agreement approval process were consistent with the understanding that Nu-West's contract rates would be exempt from the pending surcharge. Nu-West justifiably relied on those actions and representations in seeking approval of the Agreement, and it had every reason to believe this understanding was confirmed by the Commission order approving the 2001 Agreement. Under these circumstances, PacifiCorp and the Commission Staff cannot be allowed to now reverse course and argue for a Nu-West charge that they knew, or should have known, was barred by the 2001 Agreement. This is precisely the type of inequitable change of position that is forbidden by the doctrine of estoppel.

Finally, the Stipulation and Settlement clearly deprives Nu-West of due process of

law. Nu-West had no notice that any party was seeking to include it in the surcharge case until the Commission issued its Notice of Stipulation and Settlement on April 22, 2002. That Notice provided Nu-West with only eight days to prepare comments or file testimony. While Nu-West has managed to meet this filing deadline with its comments, it obviously cannot adequately prepare for evidentiary proceeding or provide testimony in the short time allowed by the Commission's filing deadline.

For the above and foregoing reasons, Nu-West requests that the Commission order the amendment of the Stipulation and Settlement prohibit any power supply surcharge on Nu-West's existing rates.

RESPECTFULLY SUBMITTED this 30th day of April, 2002.

Conley Ward
GIVENS PURSLEY LLP
Attorneys for Nu-West Industries, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the _____ day of April, 2002, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Jean Jewell
Idaho Public Utilities Secretary
472 W. Washington Street
P.O. Box 83720
Boise, ID 83720-0074
 U.S. Mail Fax x By Hand

Doug Larson
PacifiCorp
201 S. Main, Suite 2300
Salt Lake City, UT 84140
 x U.S. Mail Fax By Hand

James R. Smith
Monsanto Company
P.O. Box 816
Soda Springs, ID 83276
 x U.S. Mail Fax By Hand

Timothy Shurtz
411 S. Main
Firth, ID 83236
 x U.S. Mail Fax By Hand

John Eriksson
Stoel Rives LLP
201 S. Main, Suite 1100
Salt Lake City, UT 84111
 x U.S. Mail Fax By Hand

Eric L. Olsen
Racine Olson Nye Budge & Bailey
P.O. Box 1391
Pocatello, ID 83204-1391
 x U.S. Mail Fax By Hand

Randall C. Budge
Racine Olson Nye Budge & Bailey
P.O. Box 1391
Pocatello, ID 83204-1391
 x U.S. Mail Fax By Hand

Anthony J. Yankel
29814 Lake Road
Bay Village, OH 44140
 x U.S. Mail Fax By Hand

Tina Smith